

MACIEJ KOSZOWSKI

Why Legal Reasoning has to be Unique*

Introduction

Lawyers sometimes maintain – or at least wish it to be so – that the reasoning they employ in their work is of a unique nature, i.e. that it is distinctly different from the way in which people reason in matters of everyday life or in disciplines other than law.¹ I venture to contend, however, that what makes legal reasoning special is not the scheme of inference (its premises and general mode of reaching the conclusion), but rather the specific nature of the environment in which this reasoning takes place. That is, a scheme/general mode remains here more or less the same, being in essence: analogical (based upon the judgment of similarity), deductive (amounting to the subsumption of a concrete phenomenon under a general proposition), pragmatic (aiming to protect values and the achievement of goals we desire in the world), argumentative (consisting in balancing the pros and cons of the outcomes that are at stake) or intuitive (driven by internal insights, hunches or feelings).² Yet how legal reasoning proceeds – what turns the cogs

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1 “Legal reasoning differs in number of ways from the sort of reasoning employed by individuals in their everyday lives.” V. G. Lamond, *Precedent and Analogy in Legal Reasoning*, in *The Stanford Encyclopedia of Philosophy*, 2006, <http://www.science.uva.nl/~seop/entries/legal-reas-prec/> [access: 11.12.2016]. “It is widely believed that legal reasoning is somehow special, not just in its subject matter but in its very form.” V. L.L. Weinreb, *Legal Reason: The Use of Analogy in Legal Argument*, Cambridge 2005, pp. 1–2.

2 As for intuitive reasoning (as opposition to a rational or deliberative one) see for instance Ch. Guthrie, A.J. Wistrich, J.J. Rachlinski, *Judicial Intuition*, http://law.vanderbilt.edu/files/archive/Judicial_Intuition.pdf [access: 11.12.2016], pp. 5–10; S. Epstein, *Integration of the Cognitive and the Psychodynamic Unconscious*, “American Psychologist” 1994, vol. 49, pp. 709–724; M. Gladwell, *Blink. The Power of Thinking without Thinking*, London 2006; *Handbook of Intuition Research*, ed. M. Sinclair, Cheltenham 2011; *Heuristics and Biases. The Psychology of Intuitive Judgment*, ed. Th. Gilovich, D.W. Griffin, D. Kahneman, Cambridge 2002; *Intuition in Judg-*

of its mechanism – is strongly influenced by the conditions under which advocates and judges are forced to operate; the unavoidable necessity of dealing with a phenomenon such as the law itself. As a result, the very form of legal reasoning – though it be ordinary, having nothing that makes it stand out as distinct from other spheres of human activity – is plunged into the odd, complex, unfathomed substance that adds some deep unrepeatable colour to legal thinking when perceived as a whole. This thinking thus becomes in effect difficult to probe and elucidate, especially if one wishes to do so by simple recourse to the inferences that are known and applied elsewhere.³

Bearing in mind the above, in this paper I will endeavour to highlight the characteristic features of law that appear to be responsible for the notion that thinking like a lawyer is not the same as reasoning in everyday matters or as reaching conclusions in demonstrative or empirical sciences, or in a wide range of social sciences. While the most – as I take them – conspicuous and obvious of those features will be presented first, the more subtle and disputable ones shall be discussed later.

Being not only of a normative but also of a prescriptive character

First and foremost, considering the very nature of law, one has to stress that the main feature-cum-function of law is to be normative – i.e. to indicate how people ought to behave or not, what they may or may not require from others, and what they have to or have not to do if someone ask for that. This normativity of law has, however, to be distinguished from the normativity which occurs and is known in other provinces of science, especially empirical ones. Namely, in the latter, the expressions indicating what should or should not happen are usually of a descriptive, causal or explanatory character. In law, this is certainly not the case.

When one says that the sun should rise tomorrow at 8 o'clock, one is referring to some regularity which may be discerned in nature and thus merely describes a fact about how the physical world is arranged. Similarly, by making an assertion that an object should fall if dropped, one reports nothing more than the observable causal relation between the dropping of an object and the falling. In law, in contrast, the essence of normativ-

ment and Decision Making, ed. H. Plessner C. Betsch, T. Betsch, New York 2008, with the literature referred there.

³ A similar outlook seems to be put forward by Robert Alexy. When speaking about 'special arguments of legal logic,' he asserts that: "Of course this is not quite correct, since the forms characterized here as 'legal' [*analogy, argumentum e contrario, argumentum a fortiori, argumentum ad absurdum*] are also applicable to other domains. Of course, it has been in the jurisprudential context that many of them have been exposed to particular development. This justifies the terminology used above." V. R. Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification*, transl. R. Adler, N. MacCormick, Oxford 1989, p. 279.

ity lies in its prescriptiveness. Law neither tells us what is normal nor what regularly or statistically happens (as geography does). Nor does it reveal some causalities between objects and events (as physics does), nor does it explain human behaviour and reactions (as economics and psychology do). The normativity of law consists in ordering (prescribing) what one and others can, are entitled to, or have to do, regardless of whether they really will do so or not.⁴ Abiding by the precepts of law – be they known or not to law addressees – depends to a great extent on the decisions and choices law addressees make (their will) and to far lesser extent on the accidents and chances that addressees have no control over. As a corollary, in advance it is never known with certainty whether one will act in the way the law mandates.

In consequence, the normativity of law is – by definition – oriented towards the future, not stating any empirical fact or causality. Even when a given legal regulation is deemed to be retroactive (acting backwards), it is in fact addressed to these citizens', judges' or officials' actions which are to come after this regulation enactment, not having any normative influence on the actions and events prior to the enactment.⁵ The law neither describes nor explains phenomena. Its normativity consists in (and at the same time exhausts) the will to regulate and control human behaviours/decisions that have not yet occurred or been taken. Looking from the perspective of law addressees, one may say that it constitutes for them a – more or less compelling – reason for an action.⁶

4 As Weinreb notices: "Although we talk about what the law is, as though it is a matter of fact like a medical diagnosis or the weight a bridge will support, the content of the law is normative: It prescribes what is – that is to say, ought – to be done." V. L. L. Weinreb, *op. cit.*, p. 2. For more detail on the prescriptive and normative nature of law: F. Schauer, *Playing by The Rules. A Philosophical Examination of Rule-Based Decision-Making in Law and in Life*, Oxford 1991, pp. 1–3; G. C. Christie, *Law, Norms & Authority*, London 1982, p. 3; S. J. Burton, *An Introduction to Law and Legal Reasoning*, Austin 2007, pp. 82–85.

I do not address here the question of whether the normativeness of law has to manifest itself in rules, norms, principles, maxims and so on or can do without them (much less the question what in legal context, a norm or a rule stands for). For these issues: J. Frank, *Law & Modern Mind: with a New Introduction by Brian H. Bix*, New Brunswick 2009, pp. 132–148; cf. G. C. Christie, *op. cit.*, pp. 1–10, 16–43 and F. Schauer, *op. cit.*, pp. 112–128.

5 A separate question is whether one would have change his or her behaviour when it is known to him/her what the specific law will govern his/her case with retrospective effect, as to such doubts cf. B. N. Cardozo, *The Nature of the Judicial Process (With Notes)*, New Haven 2008, p. 61.

6 The remarks in this paragraph should not be understood in the vein that we cannot predict or explicate human behavior by reference to the content of the binding law. Assuming that people usually abide by the law, a social scientist – all the more so if also paying attention to other relevant factors such as the harshness of legal sanctions and the (in)determination of the legal regulation and these sanction enforcement – is able to make a probabilistic judgment as to how people will behave as well as to account post factum for motives of human decisions, even with a high degree of accuracy. However, this is neither a function nor a feature of law, being far rather its by-product.

Similarly, legal reasoning is employed not – as reasoning in empirical sciences – with the aim of learning something new about the surrounding nature, the regularities taking place therein, or causal relations between physical objects and their movements. Nor does it enable, at least not by definition, the understanding of human goals, wishes, and decisions. Instead of all of that, legal reasoning is an instrument, and the only instrument, through the use of which we are able to get to know what the law prescribes in concrete instances.⁷

Difficulties with empirical and ‘logical’ verification

The second important aspect of law, strictly connected with the prescriptive nature of its normativity, concerns the possibility and availability of the means and ways of the potential verification of legal content. Namely, in the empirical sciences (as chemistry, physics, biology, medicine) and even in the majority of the social sciences (e.g. economics, psychology, sociology, political science), sooner or later, we are able to test the correctness of a particular proposition in an objective or inter-subjective fashion. Indeed, in these kinds of sciences, a given statement – be it a norm or an assertion – as a rule is susceptible to empirical verification, especially via simple observation (by the direct use of human senses) or more complex (with the use of specialist equipment and devices). In a way that is difficult to question for others, such verification either definitely shows whether the statement (norm, proposition, assertion) is right and must be accepted, or at least justify the adoption of this statement until further evidence indicates its falsity.⁸ As Keith J. Holyoak and Paul Thagard aptly remark, even theories which propose unobservable things, such as subatomic particles, black holes and gravity waves, must eventually be evaluated in relation to observable evidence.⁹

In law, however, the possibility of empirical verification is not only impaired – to many it does not exist at all. Obviously, particular laws may order us to effect or to prevent the occurrence of certain events and changes in the physical world, which is possible to put to empirical test. Yet, the very question whether the law should or should not comprise

7 As Burton, probably being of the same view, notices: “Scientific and legal reasoning serve different functions requiring differences in how they are used. Propositions of the empirical sciences function to describe, explain, and predict events and relationships in the empirical world. Hypotheses are offered and tested by observation to confirm or refute their accuracy qua descriptions, explanations, and prediction. [...] Propositions of law differ fundamentally from propositions of the empirical sciences: They do not describe, explain, or predict anything. Instead, to review, laws guide conduct by *prescribing* lawful behavior; that is, they are normative.” V. S.J. Burton, pp. 83–84.

8 Cf. K. Popper, *The Logic of Scientific Discovery*, London 2002, pp. 17–26.

9 K.J. Holyoak, P. Thagard, *Mental Leaps: Analogy in Creative Thought*, Cambridge, MA 1996, p. 10. Cf. L.L. Weinreb, *op. cit.*, pp. 76–77.

precepts of such-and-such import, as it appears, remains far beyond empirical proof. That is, the contents of ‘oughtness’ – unless one firmly clings to a specific ontological doctrine such as the natural law approach or some form of legal realism, especially in a Scandinavian variant – is not derivable from ‘physical being,’ and as such cannot be verified by the epistemological measures typical of learning about this latter sphere.

Not only are the mandates of law not susceptible to any empirical proof but, in addition, their correctness (aptness) does not lend itself to be determined in the terms of logic or ‘mathematics’. Despite the efforts made by legal positivists and the like, including the transplantation of deductive terminology into law,¹⁰ law does not allow itself to be closed in the fixed system of axioms and theorems, being linked with the changing conditions of the physical and spiritual world that are in constant flux (see the next two sections).¹¹ In consequence, the proof of the truthfulness of the precepts of law – if feasible at all – is condemned to be of the non-empirical and non-demonstrative kind (see Section 5).¹²

In view of the foregoing, too, neither legal reasoning nor its outcomes appear to be amenable to empirical or logical/mathematical verification.¹³ That question is, however, more intricate than one may *prima facie* suppose. Legal reasoning, if not law itself (see Section 10), has to be based upon the content of law, and as such it does not inevitably need to inherit the impossibility of being demonstratively and empirically tested. If law mandates us to attain some specific social aims (e.g. equal rights for minorities) or to protect some values (e.g. human life or the environment) we can verify on empirical grounds whether the effects of legal reasoning (in the form of a specific legal decision/human action) are in conformity with the pertinent precepts of the law. Demonstrative proof of the outcomes of legal reasoning is, however, much more perplexing. Here, the

10 However, it is worth noting that, in fact, also mathematics and its calculus are to a large extent dependent upon conventional practice and the mode in which people are trained. As Ludwig Wittgenstein endeavors to demonstrate in his series of lectures: ‘What is called a mathematical discovery had much better be called a mathematical invention.’ V. Wittgenstein’s *Lectures on the Foundations of Mathematics Cambridge 1939: From the Notes of R.G. Bosanquet, Norman Malcolm, Rush Rhees, and Yorick Smythies*, ed. C. Diamond, Chicago 1989, p. 22.

11 As perfectly captured by Max Radin: ‘Since mathematics can do us little good in the law for the practical purposes that we dare not disavow, we cling to it as an emotional discharge. We can think out mathematical metaphors which relieve us from being too oppressively conscious of experience.’ V. M. Radin, *Law as Logic and Experience*, Clark 2012, p. 7.

12 By saying this I do not suggest that lawyers and judges should disregard logic, statistics, empirical knowledge, and mathematical calculus. These resources and tools, although useful in the legal profession, are not however aims in themselves, being mere means to attain that which is prescribed by the law. Indeed, while they serve to realize that which “oughtness” dictates, they do not decide what this “oughtness” should be. The latter question is prior to them.

13 As Weinreb explains: ‘The reasoning of a doctor or an engineer is readily and in the normal course put to the test. The patient’s health improves, or it does not; the bridge stands, or it falls. There is no comparable test of legal reasoning.’ V. L.L. Weinreb, *op. cit.*, p. 2.

main obstacle is not a lack of theoretical possibility, but the threat of gross absurdity and the injustice of legal reasoning's conclusions. The medium through which legal mandates are communicated is a language of a given community, a language which, because of the generality of its terms (features known as vagueness, ambiguity and open texture), cannot – insofar as we insist on the demonstrative character of legal reasoning – provide a just and reasonable answer to real life cases in all instances. Because of these linguistic features, answers may often be uncertain and indeterminate, something which contradicts the foundations of the one right thesis, which is fundamental for mathematics and logics, at least in their ordinary form.

It must be also stressed that the above-mentioned thesis on the lack of the possibility of the experiential verification of legal contents obviously does not pertain to the facts of the case at hand. That these facts can be proved on empirical grounds, at least to some extent, is beyond question. (The same cannot be said, however, about the 'legal facts', which belong to a completely different ontological category.) But proving them is not a question of law, but rather of the evidence and hence it is not addressed in this paper, the aim of which is rather to highlight the uniqueness of legal reasoning against the background of the unique features of law.¹⁴

Links with the physical world

Though the content of law is prescriptive and not amenable to empirical verification, it is, in some sense, evidently dependent on the shape of the physical world and the limitations inherent in it. As was hinted at in the context of the peculiarity of legal normativity, the law is designed to have an impact on human behaviour. This behaviour, however, is mostly – if not solely – a part of the physical world, that is, as a rule, the behaviour takes place therein, not in human minds (as a possible exception, one may mention a precept from canonical law forbidding thinking about adultery). As this is the case, the normative power of law is also – under the threat of being utterly inefficient – restricted to that which is viable for human beings in the physical world. In this vein, the law cannot, for instance, disregard that fulfilling such-and-such an obligation is not feasible and hence it cannot be imposed on its addressees (hence, for example, keeping grass on the Moon or living forever is clearly not within the area of the possible "oughtness"). Moreover, this dependence, in a sense, also acts the other way round. The physical world, its needs and

14 On the other hand, however, one should be aware that any ascertainment on facts, including that done by a judge in the courtroom, is frequently affected by the use of intuition (intuitive reasoning) and schematic thinking, being not a pure product of objective empirical proof. V. A. Glöckner, I.D. Ebert, *Legal intuition and expertise*, in *Handbook of Intuition Research*, ed. M. Sinclair, Cheltenham 2011, pp 159–160; Ch. Guthrie, A.J. Wistrich, J.J. Rachlinski, *op. cit.*, especially pp. 18–21, 25–29.

conditions of life, as well as the events which happen therein, more often than not need to be handled by the law. And the law can hardly ignore such a calling.¹⁵

The aforementioned relation between the law and the structure of the physical world, including the human capabilities within it, seems equally important for legal reasoning. In a manner identical to the content of law precepts, the outcomes of legal reasoning cannot go beyond the imposed limits. One is even tempted to say that they are expected to do something more, i.e. that these outcomes should – if the content of law fails to do so – refine legal content in order to make it workable.¹⁶

A human mind dependence

Law not only hinges on the constraints which flow from the human possibilities in the physical world, but also on humans themselves. Regardless of whether one comprehends legal rules as a human product or not (coming from God or being a part of nature), humans are the people who breathe life into and make room for the law. What would the law be without them? Nothing. To be a reason of action, the basis for judgment, an argument in dispute, the law needs people as a plant needs soil and water to grow, develop and flourish. It is people, not anyone else, who make, interpret, apply, enforce and abide by the law.

As a corollary, law as such also inherits human traits: virtues and vices, limitations and powers, weaknesses and strengths, wickedness and arresting beauty. It hardly – if at all – can transcend them, being under the influence of human experiences, senses of justice, outlooks, preconceptions and biases. It has its place in consciousness and in the subconscious. It is learnt from law books as well as from practical examples. But in every case, it can only be the people who may allow it to be. The law happens in human minds and most probably – i.e. if it does not have its roots in infinity or is not an element of nature – has its beginning and the end therein.

The same applies to legal reasoning, which is partly rational and partly intuitive. Its resources and premises are not always revealed; they frequently rest hidden, somewhere deep in the fathomless depths of the subconscious. The outcomes of legal reasoning can thus be a product of insight, prejudice, partiality, affect, or past events one took part in and remembered or forgot.¹⁷

15 Cf. K. Nickerson Llewellyn, *The Bramble Bush. The Classic Lectures on the Law and Law School. With a New Introduction and Notes by Steve Sheppard*, New York 2008, pp. 58–60, 115–127.

16 Another question is whether the law, a norm consisted therein, constitutes a part of the physical world (especially in the context of the possible external observation of people adjusting their conduct to and obeying certain laws). As for that question: G.C. Christie, *op. cit.*, pp. 11–13.

17 As for the dependence of the law on human mind: J. Frank, *op. cit.*, pp. 108–124; B.N. Cardozo, *op. cit.*, pp. 70–71; L. Petrazycki, *Law and Morality: With a New Introduction by A. Javier Treviño*, New Brunswick 2011, not least pp. 6–12, Llewellyn, *The Theory of Rules*, Chicago 2011,

Incidentally, the dependence of the human mind so comprehended means that the inability to provide experiential verification of the prescriptive content of law does not necessarily entail that some other means of verification cannot be found. Indeed, that which law orders us to do may be put to different sorts of non-empirical tests, for instance, against moral judgment, common sense, economic (cost-and-benefit) analysis, the current needs of society or goals of the legislature or government, or against the prevailing opinions of legal doctrine or the public. These possibilities lead to a vast array of ways by which one may claim to check the aptness of the results of legal reasoning in concrete instances. And even more interestingly, the aforementioned factors that enable us to test the outcomes of legal reasoning can influence – if not govern – legal reasoning itself. They may thus have a direct or indirect impact on deciding whether the cases being compared are sufficiently similar (analogues), whether the argument raised in a dispute by one party is more persuasive than the countervailing argument of the second party, or whether the case at hand is to be subsumed under a given rule, and how this rule is to be interpreted for that purpose.

None of the aforementioned means of verification, however, is universally compelling, much less an exclusive one. To assess legal content or the aptness of the outcomes of legal reasoning, some may prefer to refer to mores and folkways, other to dictates of economy, and yet others to policies and values the government or legislature purports to pursue and protect. Moreover, people may have different senses of justice, insights and intuitions; the public or doctrinal stance in a given question may not be settled; the experts might not agree on what is the optimal solution from the perspective of the economy and so forth. In consequence, this lack of congruence makes the results of such testing far from conclusive, at least in the sense of being exempt from the possibility of being challenged by others. However, that does not mean that in law there are no points of general consent which can constitute the foundation for legal content, as well as for the reasoning based upon it.¹⁸

pp. 39–40. Cf. an interesting assertion that the law is limited by morality – if not a part of it – due to the threat of rebellion and resistance on the part of the community, which was made by O.W. Holmes, *The Path of the Law*, “Boston University Law Review” 1965, vol. 45, pp. 26–27.

¹⁸ For good examples of the points one is not able to question, albeit rather from morals and ethics than law: R.A. Posner, *The Problems of Jurisprudence*, Cambridge, MA 1990, pp. 76, 77 (‘It is almost as certain that killing people for pure sport is evil as it is that cats don’t grow on trees’... So the fact that we cannot prove that napalming babies is bad does not imply that we cannot know that it is bad’... ‘You and I are driving; you are the driver and I the passenger. A child appears in the middle of the road, and you turn to me and say, “Should I try to avoid killing the child?” This question would mark you as crazy, just as if you told me that you had discussed this book with Plato last night.’).

An oversimplifying notion of the sameness and constant indeterminacy as corollaries of a human mind dependence

There are many specific manifestations of the dependence of law on human minds. Here, I confine myself to only two of them: the notions of sameness and inescapable indeterminacy.

Nature is unique in each and every inch of its being; there are no two things which are really identical to one other. The differences are sometimes slight but they always exist. Nonetheless, people are inclined and able to make generalizations and, as a result, to treat two or more items as if they were in effect the same. This is clearly visible in language, which comprises a multitude of generalizations such as a notion of a 'car,' a 'leaf,' a 'toy,' an 'animal' and so on. While we speak of them as belonging to a generic class, despite being fully aware that cars, leaves, toys and animals may differ considerably from each other and they in fact do so. This inclination to make oversimplifying generalizations is transferred to law. And, as a rule, law orders us to treat unique events and behaviours as if they are identical, linking with them – at least *prima facie* – the same legal consequences. Thus also legal reasoning is often premised upon the generalities present in law, notwithstanding the awareness that they do not correspond to the diversity of the phenomena they address. This is exemplified by the fact that legal reasoning is sometimes employed not with regard to concrete situations, but *in abstracto* – for example, in order to expound the meaning of legal provisions to students attending lectures at law school without any reference to a real or hypothetical case.¹⁹

Turning to the second aspect, one must bear in mind that human convictions and beliefs, the values or needs of a given community, are in constant flux. There are several reasons for this. One is constant technological advance, which brings new possibilities and options but also yields new challenges and problems to face and resolve, such as cybercrimes or new bioethical questions. A second are the changes in public consciousness and trends which hold sway in different moments in the life of a given society. Even language, the main medium of law, changes with time, giving different meanings to its terms and expressions. All of that is of the uttermost significance for the content of law and legal reasoning. They too, as they are influenced by these factors, cannot remain the same, being forced to keep up with the changes that have taken place around them. Hence, in contrast to empirical science where, as Posner put it, 'scientists have procedures which allow them to resolve the question at hand, and move on to other and more

¹⁹ Cf. an interesting suggestion that 'one of the earliest and most persistent stimuli to growth of generalization, and classification, and so of rational thought, especially that branch of rational thought which we call formal logic, is attributable more to law than to any other phase of civilization expect perhaps language' was made – against such a background – by K.N. Llewellyn, *op. cit.*, p. 127.

difficult questions' (thus gaining constant progress),²⁰ in law many problems can never be solved once and for all. We can answer them at a given time, but we are not able to decide them in the confidence that they will not need to be reopened in the future. Posner adds here: 'This lack of closure, of convergence, of progressivity – the sheer interminability of so much legal debate – makes the problem of legal indeterminacy fundamentally different from that of scientific or mathematical indeterminacy.'²¹ And Burton argues: 'As math is not the kind of thing to be criticized for lacking empirical support, law may not be the kind of thing to be criticized for lacking comprehensive determinacy of results.'²²

In consequence, indeterminacy is a vital mark of law as well as of legal reasoning. The conclusions of the latter that are good today may turn out to be erroneous tomorrow. As it transpires, this applies even to the instances in which the content of law will still remain the same but a change that takes place in the meantime somewhere else will demand a different legal outcome from that reached previously in the given sort of case.²³

Its 'unspecialized' nature due to legal agents

Another aspect of law which is highly relevant to legal reasoning is that, generally, the persons who deal with it neither know of, nor adhere to, any complex doctrines or theories. Law is very often directed to ordinary citizens who are not always well-educated, have vague ideas about the current state of the arts in particular sciences and speak everyday language. Moreover, even the craft of law lies in the hands of people who are not – if they are taught them at all – specialists in fields other than law. Thus, more often than not, judges and advocates are not psychologists, logicians, philosophers, social scientists and so on. Neither do they possess specialist knowledge in matters regulated by law either. They know hardly anything about the construction industry, the stock exchange, hydrology, animal husbandry, farming or other industries.²⁴ In the main, in practice the

20 R.A. Posner, *op. cit.*, p. 83.

21 *Ibidem*, p. 84.

22 S.J. Burton, *op. cit.*, p. 83

23 As Cardozo reveals before us: "s the years have gone by, and as I have reflected more and more upon the nature of judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable." V. B.N. Cardozo, *op. cit.*, p. 68. On the inescapable character of indeterminacy in law and how to accept it: J. Frank, *op. cit.*, pp. 172–182.

24 Instead, reference to and use of specialist knowledge seems to take place within the process of legislation. Firstly, some members of Parliament (parliamentary commissions) and of the government may possess it. Secondly, these members may also consult a board or committee composed of experts in some field of science, e.g. economy, social or labour matters, in order to assess the effects of the proposed regulations. The same goes for the possibility of consulting other specialised bodies, including non-governmental organizations. Obviously, judges, too, invoke experts in fields other than law, but that applies rather only to matters of evidence, not to the very contents of law.

law operates without overarching theories and doctrines on what is right or wrong, or which values are to be realized and in which degree and order.²⁵

The above-mentioned aspect is also of paramount importance for legal reasoning, which, being employed as a rule not by interdisciplinary experts or philosophers, has to – despite the complexity of the law – be more down-to-earth, not aimed achieving total coherence of the values law serves.²⁶ Furthermore, legal reasoners frequently do not possess well-founded logical and psychological knowledge about reasoning and its modes, reaching their conclusions rather in an intuitive or commonsensical ways.²⁷

The prominent role of authority

The above-presented characterisation of law, especially the impossibility of experiential verification, dependence on the human mind and the ‘unspecialized’ nature of its agent, contributes to and is supplemented by the enormous role of authority in legal science and practice. Indeed, in law authority seems to be indispensable, coming to the fore probably to a greater extent than anywhere else.²⁸ Thus it is, for instance, genuinely claimed that: “The boundaries of law are set by the boundaries of legal authority...”²⁹

In addition, authority in law presents itself as remarkably different from authority in the empirical and demonstrative sciences. It is not necessarily based upon widespread agreement between the members of the profession, but rather deriving its force from the renown and standing of the authors.³⁰ The more prestigious the post, title, position in the bar, or rung in the academic or judicial hierarchy an author has, the greater the authority of the propositions or statements on the contents of law he/she proffers. Accordingly, the opinions of the Justices of the Supreme Court count more than those which come from judges who sit in the courts of lower rank, and the views of a well-known and recognizable professor are of far more importance than the views a mere law graduate

25 Thus Cass R. Sunstein states: “Lawyers (and almost all other people) typically lack any large-scale theory.” V. C.R. Sunstein, *Legal Reasoning and Political Conflict*, New York 1996, p. 68. Incidentally, he appears to be very content about that, claiming that deep theories about the good or the right seem to be “too sectarian, too large, too divisive, too obscure, too high-flown, too ambitious, too confusing, too contentious, too abstract.” *Ibidem*, p. 63.

26 Cf. L.L. Weinreb, *op. cit.*, pp. 60–61, 71–73.

27 As Larry Alexander and Emily Sherwin succinctly contend: “In the world as it exists, judges are not perfect reasoners.” V. L. Alexander, E. Sherwin, *Demystifying Legal Reasoning*, Cambridge 2008, p. 43, 44; J. Frank, *op. cit.*, pp. 125–126.

28 Thus Schauer remarks: “In law, however, authority is dominant, and only rarely do judges engage in the kind of all-things-considered decision-making that is so pervasive outside of the legal system.” V. F. Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning*, Cambridge, MA 2009, p. 67.

29 *Ibidem*, p. 84.

30 R.A. Posner, *op. cit.*, pp. 79–80.

holds. The same applies to high-ranking governmental officers and their colleagues from inferior offices.

Furthermore, even more importantly, authority in empirical sciences, even when unanimously accepted, immediately loses its force when it is falsified by a credible empirical proof (such as a reliable experiment or observation). In law, instead, the authority which to others appears – from the very beginning or as time goes on – to be patently absurd or unjust may retain its force. As Posner puts it: “Authority in intellectual matters is best understood as a transmission belt that carries news of scientific or other intellectual discovery to persons lacking the time or background to verify the discovery themselves and that also authenticates the discovery for them. Authority in law is different. Judicial decisions are authoritative because they emanate from a politically accredited source rather than because they are agreed on as correct by individuals in whom the community reposes an absolute epistemic trust.”³¹ An authority in law is also generally resistant to the negative outcomes of the test or the tests mentioned in Section 5.³² What can weaken its force or nullify it is, in turn, another authority which – explicitly or implicitly – contradicts its theses or undermines these theses’ foundations.³³

The enormous role of authority in law has significance with regard to legal reasoning. It is of great importance *whose* the reasoning is, and this has a direct impact on the aptness and force of the outcome. I venture even to say that this correlation occurs here even to the extent that a great authority can sometimes make very poor legal reasoning seem to be excellent or superior.

The procedure in which legal decisions are made

The unique nature of legal reasoning is an effect of the specific features of the law as such but, no doubt, it is also a corollary of the procedure in which legal decisions are usually made, a procedure that differs considerably from the fashion in which questions in empirical and demonstrative science are resolved.

First and foremost, the decision-makers in law, i.e. the judges and officers of all sorts, are forced to answer questions which they do not choose or even want to answer. A judge is denied the right to say that his or her skills or knowledge are too weak and narrow

31 *Ibidem*, p. 82.

32 In the context of authority in law, there also occurs the problem of making an evaluation by persons who do not possess sufficient expertise on the topics which a given authority concerns. This problem is exacerbated in the process of assessing the credibility of evidence. V. F. Schauer, *op. cit.*, p. 71, footnote 26.

33 On the role and basic differences of authority in the empirical sciences and law see R.A. Posner, *op. cit.*, pp. 79–86. On the concept of authority against the legal background: F. Schauer, *op. cit.*, pp. 61–84.

to decide the case at hand.³⁴ Moreover, judges and other legal decision-makers operate under the pressure of time. They cannot postpone the decision until their experience, wisdom, and abilities develop to the point where they are able to give a correct answer to the questions posed. As Posner noted, “actually the judge is in the uncomfortable position of having both to act and to offer convincing reasons for acting. He does not have the luxury of the pure thinker, who can defer coming to a conclusion until the evidence gels.”³⁵ “The scientific community itself largely determines the field of its inquiries; it is not forced to butt its head against a stone wall. Judges decide virtually all issues society flings at them, however intractable the issue may be.”³⁶ The difficulties caused by the limited time and the obligation to render a decision in cases one does not know much about are additionally compounded by the fact that judges often decide upon tough cases. Easy ones, i.e. such in which the outcome is predictable and obvious, are as a rule – i.e. if emotional background or extremes such as insolvency of the debtor or complete ignorance/dishonesty are not a factor³⁷ – settled by the parties themselves and do not need a trial at all.

Secondly, it is commonplace that legal decisions are expected to be made upon the basis of the law, whatever this law means.³⁸ The parties, as well as the public, are unwilling to allow judges to be arbitrary or to decide the cases submitted to them with the toss of a coin. As Neil MacCormick remarks, judges ‘must do justice indeed, but “justice according to law,”³⁹ and as Weinreb underscores, one of the distinctive features of adjudication is “that the court’s decision is to be based entirely on the law.”⁴⁰ The admission by a person who has made a legal decision that this decision is not grounded in law substantially weakens, if not deprives, this decision of lawfulness.

Thirdly, legal decisions, contrary to many questions that are answered in everyday life, are not delivered in a spontaneous or informal way. For that purpose, there is envisaged

34 As Weinreb remarks: “A judge who can find no statute or judicial precedent that deals directly with the matter before her does not throw up her hands and tell the litigants to fight it out.” L.L. Weinreb, *op. cit.*, p. 81.

35 R.A. Posner, *op. cit.*, p. 72.

36 *Ibidem*, p. 84. See also S.J. Burton, *op. cit.*, p. 84 (“A scientist can conclude that the answer to a question remains unknown for decades or centuries; however, a judge should decide a law case according to the law and without undue delay”).

37 As Posner points out, since “the parties or their lawyers are obtuse or stubborn or because of acrimony arising from the underlying dispute or from the litigation itself.” See R.A. Posner, *op. cit.*, p. 78.

38 G.C. Christie, *op. cit.*, p. 32.

39 N. MacCormick, *Legal Reasoning and Legal Theory*, Oxford 1978, p. 166 (also p. 73). At this juncture, he also elucidates that: “That does not, indeed cannot, mean that judges are only to decide cases in a manner justifiable by simple deduction from mandatory legal rules; yet on the other hand, it cannot mean that they are left free to pursue their own intuitions of justice utility and common sense free of all limitations.”

40 L.L. Weinreb, *op. cit.*, p. 80.

a formal, scrupulous and casuistic procedure which is supposed to provide the case with impartial, rigorous thought and consideration.⁴¹

Fourthly, judges are compelled not only to decide cases which they would not choose, but also to give justifications – also in such unwanted cases – as to why their decisions are defensible or even the only correct/right ones. As Posner explains, the rationale of this requirement is: “The judge is not deciding what to do in his life; he is deciding what the litigants should have done in their lives, and the litigants and society demand a statement of reasons.”⁴² That obligation is fundamental to the extent that it applies even to a judge who feels that his/her decision is right but is not alert to the factors which influenced that decision and nonetheless is expected to propound somehow the reasons which speak for rendering it.⁴³

And fifthly, from the actors (litigants) angle, the procedure in which legal decisions are issued drastically limits the occasions for the verification of these decisions. The parties are usually entitled to one, or at best two, instances in which their case can be reconsidered. Afterwards, with the exception of extraordinary circumstances chiefly regarding matters of evidence, such as newly disclosed proofs or misconduct on the part of a judge (officer), the decision made in their case, even if manifestly wrong, cannot be revised and reversed.^{44 45}

As a result, it is not surprising that the legal reasoning employed by judges (officers) while they decide cases turned over to them is, while carried out under time pressure, also supposed to be mandatory, explicable, transparent and, above all, not haphazard .

41 *Ibidem*, p. 75; E.H. Levi, *The Nature of Judicial Reasoning*, “The University of Chicago Law Review” 1965, vol. 32, no. 3, p. 397.

42 R.A. Posner, *op. cit.*, p. 72.

43 On that problem see for instance A. Peczenik, *On Law and Reason*, Lund 2009, pp. 278–279.

44 Naturally, there are also other possible ways of the verification of correctness of legal decisions, viz. those mentioned in section no. 5. For most judges, especially prominent are probable remarks coming from other judges, self-critique and the opinion of law academics. However, on the weakening – because of their alienation – of respect for the works of scholars from leading law schools among judges in the USA see R.A. Posner, *How Judges Think*, Cambridge, MA 2008, pp. 204–229.

45 Obviously a judicial process (reasoning) can also be described in other terms, and its other attributes may be underscored. For instance, Levi points to such obligations of a judge that give uniqueness to judicial reasoning (in relation to the USA legal system and society) as: “the duty of representing many voices, of justifying the new application in terms of prior rule and the equality of other cases, the assumption that reason is a sufficient and necessary guide, the responsibility for moral judgment and the importance of sincerity.” V. E.H. Levi, *op. cit.*, pp. 397–398. Weinreb in turn seems to underline the argumentative and the two- or more sided aspect of legal decision-making in saying that: “A judicial decision of any significance is carefully considered and is not likely to be reached until the issue has been debated and alternative outcomes forcefully defended.” V. L.L. Weinreb, *op. cit.*, p. 75.

A separate question is that due to its dependence on the human mind, all such attributes are not – at least completely – in practise attainable.

Obviously, not only judges (officers) but also academics reason in law, especially while they work out commentaries, glosses and treaties. This is also the case with advocates during their counselling, with parties themselves when in dispute, and with citizens who want to get to know what their legal duties and rights are. The reasoning of these actors may differ from that of judges: it may not be conducted under considerable time pressure and generally be less formal and rigorous. However, in order to be effective and to serve the aims of the person who employs it (this person or client), this time cannot be unlimited, and neither can the reasoning be obscure or random.

Relation of the content of law to legal reasoning (its outcomes)

Hitherto, it has been taken for granted that legal reasoning and the content of law are separable and could be considered separately from one another. Such an assumption is, however, highly dubious and I would not be content to endorse it. I rather believe that legal reasoning and legal contents are two faces of the same phenomena which is law as such and, in fact, are indissoluble. This, *inter alia*, finds support in the fact that the law – in common law but also in civil law legal families – to a great extent amounts to the outcomes (or its prophecies) of legal reasoning employed in relation to concrete or hypothetical cases. This stance is not a common opinion,⁴⁶ being for instance in overt contradiction with the movement of so-called legal positivism, and this paper is not a good place to argue for it. However, if the suggested fusion really takes place, the influence of peculiar features of law, which have been taken up in this paper, on legal reasoning would only be more definite and explicit.⁴⁷

Conclusions

The uniqueness of legal reasoning, its distinctiveness from the reasoning present in other fields of the sciences and everyday life, seems to stem not from the very form (scheme, mode) of this reasoning, but rather to be a result of the complexity of law and the procedure in which legal decisions are delivered. Thus, because of the non-descriptive character of law, legal reasoning is also not employed in order to get to know something

46 Interestingly, Christie appears to reserve the name 'law' for only uninterpreted cases and statutes (i.e. the raw form of them, not their meaning), since only they are – in his opinion – definite enough to be called so. V. G.C. Christie, *op. cit.*, p. 58.

47 Another question is the separation of law and the facts of the case at hand, which can also be seen as not – at least completely – possible. See S.J. Frank, *op. cit.*, p. 125.

new about the physical world. Instead, it is conducted in order to establish what the law prescribes, i.e. what people may do or are required to do, as well as what they can demand from others. Similarly, both legal reasoning and law itself are largely dependent on the limits the physical world places upon people, as well as on people's mental and non-mental capabilities. These limits and capabilities, together with the conditions in which men live, constrain the possible prescriptive content of the law, strongly influencing how legal reasoning proceeds and where it may bring us. In particular, the outcomes of legal reasoning – analogous to the law itself – are not stable, and with time, even if originally correct, may be brought into question and arguments supporting them are no longer compelling. One must also remember that legal reasoning, as with the law in general, is not the domain of those who are experts in fields other than law. Despite the lack of specialist knowledge on the part of most judges and lawyers, or perhaps just because of this fact, the role of authority in law is extremely large. Authority coming from the position and standing of a person who reasons has a direct impact on the force of (and paradoxically also on quality of) the conclusions this person comes to.

Apart from the above-mentioned features, legal reasoning – especially the judicial kind – is also conditioned by the procedural setting in which legal decisions are usually made. This setting poses an additional requirement on how legal decision-makers are expected to proceed, above all putting emphasis on the need for legal reasoning to be formal, transparent, externally justifiable and, at the same time, relatively fast.

Literature

- Alexander L., Sherwin E., *Demystifying Legal Reasoning*, Cambridge 2008.
- Alexy R., *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification*, transl. R. Adler, N. MacCormick, Oxford 1989.
- Burton S.J., *An Introduction to Law and Legal Reasoning*, Austin 2007.
- Cardozo B.N., *The Nature of the Judicial Process (With Notes)*, New Haven 2008.
- Christie G.C., *Law, Norms & Authority*, London 1982.
- Epstein S., *Integration of the Cognitive and the Psychodynamic Unconscious*, "American Psychologist" 1994, vol. 49.
- Frank J., *Law & Modern Mind: with a New Introduction by Brian H. Bix*, New Brunswick 2009.
- Gladwell M., *Blink. The Power of Thinking without Thinking*, London 2006.
- Glöckner A., Ebert I.D., *Legal intuition and expertise*, in *Handbook of Intuition Research*, ed. M. Sinclair, Cheltenham 2011.
- Guthrie Ch., Wistrich A.J., Rachlinski J.J., *Judicial Intuition*, http://law.vanderbilt.edu/files/archive/Judicial_Intuition.pdf [access: 11.12.2016].
- Handbook of Intuition Research*, ed. M. Sinclair, Cheltenham 2011.

- Heuristics and Biases. The Psychology of Intuitive Judgment*, ed. Th. Gilovich, D.W. Griffin, D. Kahneman, Cambridge 2002.
- Holmes O.W., *The Path of the Law*, "Boston University Law Review" 1965, vol. 45.
- Holyoak K.J., Thagard P., *Mental Leaps: Analogy in Creative Thought*, Cambridge, MA 1996.
- Intuition in Judgment and Decision Making*, ed. H. Plessner, C. Betsch, T. Betsch, New York 2008.
- Lamond G., *Precedent and Analogy in Legal Reasoning*, in *The Stanford Encyclopedia of Philosophy*, 2006, <http://www.science.uva.nl/~seop/entries/legal-reas-prec/> [access: 11.12.2016].
- Levi E.H., *The Nature of Judicial Reasoning*, "The University of Chicago Law Review" 1965, vol. 32, no. 3.
- Llewellyn K.N., *The Bramble Bush. The Classic Lectures on the Law and Law School*, New York 2008.
- Llewellyn K.N., *The Theory of Rules. Edited and with an Introduction by Frederic Schauer*, Chicago 2011.
- MacCormick N., *Legal Reasoning and Legal Theory*, Oxford 1978.
- Peczenik A., *On Law and Reason*, Lund 2009.
- Petrzaycki L., *Law and Morality: With a New Introduction by A. Javier Treviño*, New Brunswick 2011.
- Posner R.A., *How Judges Think*, Cambridge, MA 2008.
- Popper K., *The Logic of Scientific Discovery*, London 2002.
- Posner R.A., *The Problems of Jurisprudence*, Cambridge, MA 1990.
- Radin M., *Law as Logic and Experience*, Clark 2012.
- Schauer F., *Playing by The Rules. A Philosophical Examination of Rule-Based Decision-Making in Law and in Life*, Oxford 1991.
- Schauer F., *Thinking Like a Lawyer: A New Introduction to Legal Reasoning*, Cambridge, MA 2009.
- Sunstein C.R., *Legal Reasoning and Political Conflict*, New York 1996.
- Weinreb L.L., *Legal Reason: The Use of Analogy in Legal Argument*, Cambridge 2005.
- Wittgenstein's Lectures on the Foundations of Mathematics Cambridge, 1939: From the Notes of R.G. Bosanquet, Norman Malcolm, Rush Rhees, and Yorick Smythies*, ed. C. Diamond, Chicago 1989.

SUMMARY

Why Legal Reasoning has to be Unique

This article addresses the issue of the uniqueness of legal reasoning and, specifically, the author advances the thesis that what makes legal reasoning different from the reasoning

employed in demonstrative and empirical sciences and matters of everyday life is not the actual form (scheme) of this reasoning but the legal milieu. Thus, he tries to demonstrate that some features of law – such as its normative and prescriptive nature, difficulties with the verification of its content on empirical grounds, its limitations stemming from the physical world and dependence on humans and their minds, as well as the ‘unspecialized’ character of law agents and the extraordinary role of authority – influence legal reasoning as well. At the same time these features also allow this reasoning to be unique, despite its adoption of forms of inference that are present elsewhere.

Keywords: law, legal, lawyers, reason, reasoning, thinking, inference, peculiarity, specific, features

MACIEJ KOSZOWSKI, Łazarski University in Warsaw, Faculty of Law and Administration, Świeradowska 43, 02–662 Warszawa, Republic of Poland, e-mail: negotium@op.pl.